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OF LAW ON THE
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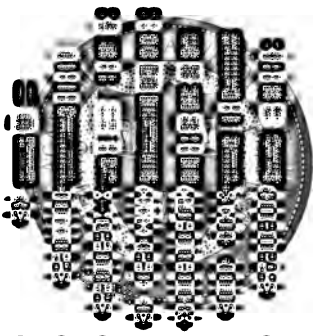

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Memorandum of Law

on the

Construction of Section 10 of The Federal Penal Code

By

CHARLES WARREN

ASSISTANT ATTORNEY GENERAL

WASHINGTON

GOVERNMENT PRINTING OFFICE

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FEDERAL PENAL CODE, SECTION 10.

Whoever, within the territory or jurisdiction of the United States, enlists, or enters himself, or hires or retains another person to enlist or enter himself, or to go beyond the limits or jurisdiction of the United States with intent to be enlisted or entered in the service of any foreign prince, state, colony, district, or people, as a soldier, or as a marine or seaman, on board of any vessel of war, letter of marque, or privateer, shall be fined not more than one thousand dollars and imprisoned not more than three years.

Rec. Dec. 10, 1915.

MEMORANDUM OF LAW ON THE CONSTRUCTION OF SECTION 10 OF THE FEDERAL PENAL CODE.

GENERAL PURPORT OF THE STATUTE.

It is to be noted at the outset, that the provisions of the statute law with respect to the actions forbidden to persons recruiting or enlisting in the United States are more limited than are the obligations which a foreign nation itself owes to the United States as a neutral nation to refrain from actions derogatory to the sovereignty of the United States.

As was said by Attorney General Cushing, in 1855 (7 Op. Atty. Gen. 378, 380, 381):

"It is further to be observed, in conclusion of this branch of the subject, that, whether the acts of the British minister and his agents, in recruiting troops within the United States, do or do not come within the technical provisions of the acts of Congress, is altogether immaterial to the question of international right, as between this Government and that of Great Britain. If, by ingenious evasions of the letter of a penal statute intended only for private malefactors, the British Government should, nevertheless, levy troops here, the fact of the statute being thus defeated and trampled under foot would serve only to augment the public wrong."

* * * * * * *

"But the radical absurdity is in assuming that a foreign Government may lawfully do on the territory of another Government, or cause to be done, anything whatever, which is not made penal by local statutes. This assumption is altogether groundless. The law of nations is international, not domestic or municipal; it is the *ensemble* of international conventions, usages, and received opinions, aided, in case of need, by the doctrines of abstract justice and of universal reason. It is not restricted to the bounds of acts of Parliament or acts of Congress. International right would be reduced to a singular condition, indeed, if it consisted of those things, and those things only, which, for consideration of international convenience, Great Britain or the United States may have happened to enact as law by means of their legislative assemblies.

* * * * * * *

"In truth, the statute in all these matters is of but secondary account. The main consideration is the sovereign right of the United States to exercise complete and exclusive jurisdiction within their own territory; to remain strictly neutral, if they please, in the face of the warring nations of Europe; and of course not to tolerate enlistments in the country by either of belligerents, whether for land or sea service. If there be local states to punish the agents or parties to such enlistments, it is well; but that is a domestic question for our consideration, and does not regard any foreign Government. All which it concerns a foreign Government to know is, whether we, as a Government, permit such enlistments."

And as stated by Secretary Marcy to Mr. Crampton, September 5, 1855 (Moore's *International Law Digest*, vol. II, p. 447):

"In authorizing a plan of recruitment, which was to be carried out in part within our territory, the British Government seems to have forgotten that the United States had sovereign rights as well as municipal laws which were entitled to its respect. For very obvious reasons the officers employed by Her Majesty's Government in raising recruits from the United States would, of course, be cautioned to avoid exposing themselves to the penalties prescribed by our laws, but the United States had a right to expect something more than precautions to avoid those penalties. They had a right to expect that the Government and officers of Great Britain would regard the policy indicated by these laws, and respect our sovereign rights as an independent and friendly power."

And by Secretary Marcy to Mr. Buchanan (*ibid*, p. 448):

"In his view of the question as to the rights of territory, irrespective of municipal law, Lord Clarendon is understood to maintain that Her Majesty's Government may do anything within the United States short of enlisting and organizing and training men as soldiers for the British Army with perfect respect to the sovereign rights of this country.

"This proposition is exactly the reverse of that maintained by this Government, which holds that no foreign power whatever has the right to do either of the specified acts without its consent. No foreign power can, by its agents or officers, lawfully enter the territory of another to enlist soldiers for its service, or organize or train them therein, or even entice persons away in order to be enlisted without express permission."

And by President Pierce in his annual message, December 31, 1855 (*ibid*, p. 447):

"* * * It is our sovereign right that our territory and jurisdiction shall not be invaded by either of the belligerent parties for

the transit of their armies, the operations of their fleets, the levy of troops for their service, the fitting out of cruisers by or against either, or any other act or incident of war. And these undeniable rights of neutrality, individual and national, the United States will under no circumstances surrender."

Aside from the question of the duty imposed upon a foreign nation by international law, the statute of the United States makes it unlawful for any person "within the territory or jurisdiction of the United States,"

(*a*) To enlist;
(*b*) To enter himself;
(*c*) To hire or retain another person to enlist;
(*d*) To hire or retain another person to enter himself;
(*e*) To hire or retain another person to go beyond the limits or jurisdiction of the United States with intent to be enlisted or entered

in the service of any foreign prince, State, colony, district, or people as soldier or as a marine or seaman.

It is to be noted that, in order to render one liable under the law, the enlistment or entering himself must be completed within the United States. Congress has not made it a crime to leave the United States with intent to enlist abroad.

As was said in *United States* v. *Hertz* (1855) 26 Fed. Cases No. 15357:

"The meaning of the law then, is this: that if any person shall engage, hire, retain or employ another person to go outside the United States to do that which he could not do if he remained in the United States, viz. to take part in a foreign quarrel; if he hires to go, knowing that it is his intent to enlist when he arrives out—to enlist and engage him, or carry him, or pay him for going, because it is the intent of the party to enlist; then the offence is complete within the section. *Every resident of the United States has a right to go to Halifax and there to enlist in any army that he pleases; but it is not lawful for a person to engage another here to go to Halifax for that purpose.* I trust I make myself sufficiently clear to the jury that they may comprehend the distinction. It is the hiring of the person to go beyond the United States, that person having the intention to enlist when he arrives out, and that intention known to the party hiring him, and that intention being a portion of the consideration before he hires him, that defines the offense." (p. 295.)

And numerous precedents establish the right of subjects of another nation to depart from this country individually or in groups or bands for the purpose of serving in foreign armies, so long as the

manner of their departure does not constitute a military expedition within the meaning of section 13 of the Penal Code. See *United States* v. *Hart* (1896) 74 Fed. 724; *United States* v. *O'Brien* (1896) 75 Fed. 900; *Wiborg* v. *United States* (1896) 163 U. S. 632.

Aside from any question of a municipal statute of the United States, The Hague Convention No. V (1907) relieves a neutral nation of any obligations as follows:

"ART. 6. The responsibility of a neutral Power is not engaged by the fact of persons crossing the frontier separately to offer their services to one of the belligerents."

THE ORIGIN OF SECTION 10 OF THE FEDERAL PENAL CODE.

The original of section 10 of the Federal Penal Code was the Act of June 5, 1794, c. 50, sec. 2 (1 Stat. 381–383), which is substantially similar, but with the addition of the following provisos:

"*Provided*, That this shall not be construed to extend to any subject or citizen of a foreign prince or state who shall transiently be within the United States and shall on board of any vessel of war, letter of marque or privateer, which at the time of its arrival within the United States was fitted and equipped as such, enlist or enter himself or hire or retain another subject or citizen of the same foreign prince or state, who is transiently within the United States, to enlist or enter himself to serve such prince or state on board such vessel of war, letter of marque or privateer, if the United States shall then be at peace with such prince or state. *And provided further*, That if any person so enlisted shall within thirty days after such enlistment voluntarily discover upon oath to some justice of the peace or other civil magistrate, the person or persons by whom he was so enlisted, so as that he or they may be apprehended and convicted of the said offence; such person so discovering the offender or offenders shall be indemnified from the penalty prescribed by this act."

This Act by its terms (section 10) was to be in force for two years only. It was continued by the Act of March 2, 1797, c. 5 (1 Stat. 497), for two more years, and made permanent by the Act of April 24, 1800, c. 35 (2 Stat. 54). It was reenacted in section 2 of the Act of April 20, 1818, c. 88 (3 Stat. 447); and (without the above provisos) became R. S. section 5282.

A search of early English statutes discloses that the earliest source from which the American statute was derived was the Act of 13 Anne, c. 10, in 1713 (Statutes of the Realm, 1821, Reprint. 12 Anne, c. 11, in some editions), entitled "An act to prevent the listing Her Majesties subjects to serve as soldiers without Her Majesties license,"

enacted for the purpose of preventing enlistment of soldiers by the pretender to the throne, as appears from the following preamble:

"Whereas several ill-affected Persons, Subjects of the Crown of Great Britain, have lately in open Defiance of the Laws presumed traitorously to list divers of Her Majesties subjects within the Kingdoms of Great Britain and Ireland to serve the Person pretended to be Prince of Wales during the life of the Late King James the Second, and since his Decease pretending to be and taking upon himself the Stile and Title of King of England by the name of James the Third, as Soldiers to the great disturbance of the Peace of these Her Majesties Kingdoms. And whereas the like traitorous Practice may be more covertly carried on under Pretense of listing Her Majesties Subjects to serve as Soldiers under some Foreign Prince, State, or Potentate, For Remedy thereof, Be it enacted, etc."

The act provided that:

"* * * if any Subject of the Crown of Great Britain, from and after the First Day of August next, shall within the Kingdom of Great Britain or Ireland, or from and after the First Day of October next without the same, *list or enter himself* OR *procure any Person* being a Subject of Her Majesty, Her Heirs or Successors, *to list or enter himself* OR *hire or retain any Person* being a Subject of Her Majesty, Her Heirs or Successors, with an Intent to cause such Person to list or enter himself OR procure any Person being a Subject of Her Majesty, Her Heirs or Successors, to go beyond the Seas or embark with Intent and in order to be listed to serve any Foreign Prince, State, Potentate, or Person whatsoever, as a Soldier without leave or license of Her Majesty, Her Heirs or Successors, first obtained for listing any of the Subjects of Her Majesty, Her Heirs or Successors, to serve any such Foreign Prince, State, or Potentate or Person as Soldiers under the Sign Manual of Her Majesty, Her Heirs or Successors, every such Person so offending being thereof lawfully convicted shall be taken, deemed and adjudged to be guilty of High Treason and shall suffer and forfeit as in Cases of High Treason.

"Provided always that no License shall be effectual to exempt any Person from the Penalty of this Act who shall list or cause to be listed or entred any of the Subjects of Her Majesty, Her Heirs or Successors, in the Service of the French King until after the said French King shall have disbanded, broke and dismissed all the Regiments, Troops or Companies of Soldiers which he hath or may have in His service consisting of the natural-born Subjects of the Crown of Great Britain."

This act was to continue in force for three years from August 1 and to the end of the next Parliament.

A similar act, undoubtedly the immediate source of the American statute, was passed in 1736 (9 George 2, c. 30), "An act to prevent the listing his Majesty's subjects to serve as soldiers without his Majesty's license," as follows:

"Whereas divers of his Majesty's subjects have been of late seduced to enlist themselves to serve as soldiers under foreign princes, states, or potentates, which practice is highly prejudicial to the safety and welfare of this kingdom; for remedy thereof, be it enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That *if any subject* of the crown of Great Britain, from and after the twenty fourth day of June next, shall within the Kingdom of Great Britain or Ireland, or from and after the twenty ninth day of September next without the same, *enlist or enter himself*, OR if any person shall procure any subject of his Majesty, his heirs or successors, *to enlist or enter himself*, OR *hire or retain any person* being a subject of his Majesty, his heirs or successors, *with an intent to cause such person to enlist or enter himself*, OR *procure any person* being a subject of his Majesty, his heirs or successors, *to go beyond the seas*, or embark, *with an intent and in order to be enlisted to serve* any foreign prince, state, or potentate, as a soldier, without leave or license of his Majesty, his heirs or successors, first had and obtained for enlisting any of the subjects of his Majesty, his heirs or successors, to serve any such foreign prince, state, or potentate, as soldiers, under the sign manual of his Majesty, his heirs or successors, every such person so offending, being thereof lawfully convicted, shall be taken, deemed, and adjudged, to be guilty of felony, and shall suffer death as in cases of felony without benefit of clergy.

"II. And be it further enacted by the authority aforesaid, That where any offence against this act shall be committed out of this realm, the same may be alleged to be committed, and may be laid, enquired of, and tried, in any county in England.

"III. Provided always, and be it further enacted by the authority aforesaid, That in case any person so enlisted, or inveigled, or enticed to go beyond the seas in order to be enlisted, as a non-commissioned officer, or private soldier, in any foreign service, without his Majesty's license first had and obtained as aforesaid, shall within fourteen days after such enlisting or agreement to go beyond the seas, voluntarily discover upon oath before any of his Majesty's justices of the peace or other civil magistrate, the person or persons by whom he was so enlisted, inveigled, or enticed, as aforesaid, so as he or they may be apprehended and convicted of the said offence, such person or persons so discovering as aforesaid, shall be indemni-

fied from the penalty inflicted by this act, and all other penalties whatsoever on account of the said offence."

It will be noted that section 3 of this statute is the original of the provisos of the American Act of 1794 (which have been dropped from section 10 of the Penal Code).

The English Act of 1736 was easily available to American lawyers and legislators in 1794, as it is set forth in Hawkins *Pleas of the Crown* (Vol. I, p. 74), one of the few books on criminal law then in use in the United States.

In 1756, certain doubts having arisen as to the meaning of these earlier foreign enlistment statutes, a further declaratory statute was enacted (Section 4 of the Act of 29 George II, c. 17) as follows:

"IV. And whereas a practice has been introduced in order to evade and elude the provisions made by an act passed in the ninth year of his present Majesty's reign, intituled, An act to prevent the listing his Majesty's subjects to serve as soldiers without his Majesty's licence, by hiring, retaining, or procuring his Majesty's subjects to go beyond the seas, or embark, with an intent upon their arrival abroad, to inlist and enter themselves to serve as soldiers in foreign service, without actually giving them any inlisting money at the time of their so procuring them to go abroad, with the intent aforesaid: and whereas a doubt has arose, whether the so hiring, retaining or procuring, his Majesty's subjects, with intent to embark, and go beyond the seas, to be inlisted when abroad to serve as soldiers in foreign service, without actually paying to such persons, and their receiving inlisting money here from the persons so hiring, retaining or procuring, be an inlisting within the meaning and intention of the said act of the ninth of his present Majesty, as to make such person liable to the provisions and penalties of the said act: for removing the said doubt, and for the more effectually preventing a practice so highly detrimental to this Kingdom; be it declared and enacted, That if any subject of the crown of Great Britain hath engaged, contracted or agreed, or shall engage, contract or agree, within the kingdom of Great Britain or Ireland, to go beyond the seas, or embark, with an intent and in order to inlist and enter himself to serve as a soldier in any foreign service, though no inlisting money be actually paid to or received by him; or if any person hath hired, retained, engaged or procured, or shall hire, retain, engage or procure any subject of his Majesty, his heirs or successors, though no inlisting money hath been or shall be actually paid to or received by him, to agree to go beyond the seas, or embark, with an intent and in order to be inlisted to serve any foreign prince, state or potentate, as a soldier, without leave or license of his

Majesty, his heirs or successors, first had and obtained for that purpose, every such person so offending, being thereof lawfully convicted, shall be adjudged to be guilty of felony, and shall suffer death as in cases of felony, without benefit of clergy."[1]

It is apparent, therefore, that those phrases in the American statute which seem to require any judicial construction, viz, "hire or retain" and "enlist or enter himself," were directly copied from the English acts, and must therefore be given the definition and construction which they had in those acts. Hence, to ascertain the meaning of those words as they first appeared in the Act of 1713, it becomes necessary to consider the history of the English methods of entry into military service prior to that date.

The Object of the English Foreign-Enlistment Acts of 1713, 1736 and 1756.

In the first place it is to be noted that the English Acts of 1713, 1736, and 1756 were not passed in the performance of any neutral obligation or assertion of any sovereign right under international law.

Attorney General Cushing (7 Op. Atty. Gen., p. 368) states in the opening of his elaborate discussion that:

"The rule of public law is unequivocal on this point and is correctly stated by *Wolff* to the effect that, since the right of raising soldiers is a right of majesty which must not be violated by a foreign nation, it is not permitted to raise soldiers in the territory of a state without the consent of its sovereign. (*Jus Gentium*, 747–753.)"

To the same effect he cites *Vattel*, *Kluber*, *de Martens*, *Hautefeuille*, *Galiani*, *Riquelme* as holding that the recruiting of soldiers on its territory *by a foreign nation* is a violation of the *right* of a neutral nation under international law. It is to be noted, however, that even the authorities cited were published considerably later than the dates of the statutes in question, Wolff's *Jus Gentium* being published in 1749, Vattel's *Droit des Gens* in 1758, de Martens' *Droit des Gens* in 1788, and the others later still. Moreover, the doctrine refers only to recruiting by the foreign nation itself, and not to acts performed on English soil by individuals.

And neither prior to 1713 (the date of the English statute) nor prior to 1794 (the date of the American statute) had any writer on international law asserted the doctrine that it was the *duty* of a neutral nation absolutely to prevent levy on its soil of troops for foreign enlistment. (See in this connection *The Brig Alerta* (1815), 9 Cranch, p. 365.)

[1] It may be noted that Attorney General Cushing, in his elaborate opinion in 1855 on foreign enlistment in the United States (7 Op. Atty. Gen. 367), makes no mention of these English acts, and only cites the much later Act of 59 George III, c. 69, in 1819.

It appears, therefore, that the English Act of 1713 was purely municipal legislation, designed to prevent the performance of certain actions in England deemed by the English Government to be noxious. The preamble of the Act clearly states its purpose, viz, to prevent British subjects from enlisting themselves or from procuring other British subjects in Great Britain to enlist for service under any other prince or State without the Queen's consent. One fact is to be particularly noted: the statute only applied to the enlistment *by* British subjects and *of* British subjects.

The Act of 1736 was slightly more comprehensive. It forbade British subjects in Great Britain to enlist for foreign service and it also forbade "any person" (instead of any British subject, as in the previous act) to procure British subjects to enlist. It is significant that neither act had any reference to the recruiting or enlisting of subjects of a foreign nation on the soil of Great Britain.

The American Act of 1794 extended the prohibition by forbidding *any person* within the United States to enlist for foreign service or to procure *any other person* to enlist—thus making unlawful the recruiting or enlisting of all foreign citizens within this country. [See *infra*, p. 25–29.] The English Act of 1756 made penal certain actions which had not been crimes theretofore, viz: to "engage, contract or agree * * * to go beyond the sea with intent and in order to enlist." This portion of the Act apparently was not copied into the American Act. The statutory declaration, however, in the Act of 1756, that the crime of enlisting or agreeing to enlist or hiring another to enlist or go beyond the seas to enlist was to be deemed complete even "though no inlisting money hath been or shall be actually paid to or received by him" must, undoubtedly, be taken into consideration in construing the American Act. [See *infra*, p. 19.]

HISTORY OF THE LAW AS TO MILITARY SERVICE IN GREAT BRITAIN PRIOR TO 1794.

The early method of military service, prior to 1644, is stated in Coke's *Institutes* (Vol. III, p. 86), as follows:

"* * * the ancient manner of retainer of souldiers * * * is utterly altered: for then knights or gentlemen expert in war, and of great revenues and livelihood in their countrey, covenanted with the King to serve him in his war for such a time with such a number of men: and the souldiers made their covenant with their leaders or masters, and then they were mustered before the kings commissioners, and entered of record before them; and that was certified into the exchequer, and thereupon they took their wages of the king * * *."

Hale's *Pleas of the Crown* (Vol. I, p. 672) existing in MSS. in the middle of the Seventeenth Century, states the method in more detail, as follows:

"that as well the soldiers as the captains were under contract to serve in the war, some for longer time, some for shorter, and sometimes the subordinate soldiers contracted with the king, but most commonly the captain contracted with the king to serve him with such a number of men raised by himself for such a time, as half a year or the like, and the captain made his contract with his soldiers (therefore called his retinue) and the captain received the pay for himself and them."

The soldiers, so contracted for or with, or "indented," were termed "retained," and the body of retained soldiers was termed the "retinue." (See *Tyler* v. *Pomeroy*, 8 Allen (Mass.), p. 486, 487, per Mr. Justice Horace Gray.)

Thus the preamble of the Act of 1439, 18 Henry VI, c. 19, sets forth.

"Seeing divers and many soldiers before this time, which have taken parcel or half their wages of their captains, and so have mustered and been entered of record the King's soldiers before his Commissioners, for such terms for which their masters have indented, have some time presently after their muster, and the receipt of part or of the whole of their wages, departed and gone where they would," etc.

And the Act provided:

"That no soldier, man of arms, or archer, so mustered of record, and going with his captain beyond the sea, shall return into England, within the term for which his captain hath *retained* him," etc.

and that—

"every man so mustering and receiving the King's wages which departeth from his captain within his term,"

shall be guilty of felony.

So, in 18 Henry VII, c. 18 (a companion act), it was provided:

"That no captain which hereafter shall have the conduct of such *retinues*, and shall receive the King's wages for the same, shall abate of his soldiers, nor any of them, any part of their wages," etc.

So, in 7 Henry VII, c. 1, in 1490, entitled "The penalty of a captain or soldier *retained* to serve the King in his intended wars, not doing their duties," it is provided (in the second paragraph):

"And that every captain, petty captain, and all other having under them *retinue* of any soldier or soldiers at the King's wages, shall,

upon the pain aforesaid, pay to their *retinue* of soldier or soldiers," etc.

And again:

"And if any soldier, being no captain, immediately *retained* with the King, which hereafter shall be in wages and *retained*, or take any prest, to serve the King upon the sea, or upon the land beyond the sea, depart out of the King's service without license of his captain, that such departing be taken, deemed, and adjudged felony," etc.

This statute was reenacted (with verbal changes) in 1511, in 3 Henry VIII, c. 5.

Hale in his *Pleas of the Crown*, writes (Vol. I, p. 677) that "there are very many indentures of retainers of record according to the ancient form long after that time," i. e., after 1490 and 1511.

While these early statutes were apparently in force at least until the enactment of the first Mutiny Act (1688) (see *infra*, p. 14), in *The Case of Soldiers*, 6 Coke's Reports, 27a (1601), it was said that the "ancient manner of retaining soldiers * * * is now utterly changed."

In Hawkins' *Pleas of the Crown* (6th ed., 1777–1787, Vol. I, p. 184) it is said that "the method of retaining soldiers * * * is disused," but that the statutes of 7 Henry VII and 3 Henry VIII are "still in force."

It appears, however, that already in 1490, a distinction had arisen between being actually retained and taking what was called "prest"; for the statute of that year made it felony for a soldier who had come into the service of the King to depart without license if he be (a) "in wages and retained," or (b) "Take any prest to serve the King."

In *The Soldiers Case*, Cro. Car. 71, in 1627, it is said:

"In ancient times soldiers were taken and pressed by the Captain themselves."

In the report of the same case in Hutton's Reports, 134, it is stated that:

"It was unanimously agreed, that if one takes presse-money, and when he should be delivered over, he withdraw himself, that is not felony, although he is hired and retained to serve."

"This opinion," it is said by Justice Gray in *Tyler* v. *Pomeroy*, *supra*, "puts it beyond doubt that soldiers must have both received money and come under actual command of a leader to warrant their punishment as deserters under these statutes." (p. 489.)

In early days, the word "prest" meant the voluntary receipt or taking by the soldier of part payment of wages, or "the earnest of their contract"; later, however, the practice arose, under statutes,

of compelling men to take "prest money." (See Hale's *Pleas of the Crown*, Vol. I, pp. 677, 678.)

It appears that the system of retaining fell into disuse when statutes requiring compulsory service began to appear. Thus, in 1518, the Act of 2 and 3 Edward VI, c. 2, provided for captains to whom the King issued letters for the "levying or setting forth" of men to serve the King, and made it a felony for any soldier "serving the King in his wars," to depart without license. This statute was revived in 1557 in 4 and 5 Philip and Mary, c. 3, which act also referred to persons "authorized to levy, muster, or make any men to serve in their [their Majesties'] wars, or otherwise, for the defense of this realm."

From the above it would seem that, by the end of the Sixteenth Century, men who actually served in the war, or who had been formally retained, or who had received part payment of their contract for service, if under command of a captain, were all held to be soldiers, so as to subject them to the charge of felony if they departed without license; in other words, if a man under a captain received wages or part wages ("prest") as a soldier, or actually served, he was considered subject to military duty, even if he had not been formally bound by indenture.

It does not appear, however, that either the word "enlisted," "inlisted," or "listed" was used in any of these early statutes.[1]

There was in all cases, however, some form of enrollment. Thus in *The Soldiers Case*, in 1627, Croke Car., 71, it is recited:

"Whereas one had received press-money, to serve the King in his wars, was enrolled, taken pay, and delivered amongst the other soldiers to a conductor to be brought to the sea-side, and did afterward withdraw himself, and run away without license; whether his departure be felony, etc."

In 1688, a fundamental change was made in military law in Great Britain by the enactment of the first annual mutiny act (1 William and Mary, c. 5), removing the punishment of military offenders from the criminal courts to courts-martial. It applied to persons "being in their Majesties' service in the army and being mustered and in pay as an officer or soldier."

The Mutiny Act of 5 and 6 William and Mary, c. 15, in 1694, for the first time contained the word "listed," and provided that no person should be "esteemed a listed soldier" unless he should before a civil magistrate "declare his free consent to be listed or mustered as a soldier before he should be listed or mustered on any muster roll."

[1] Murray's English Dictionary (1910) cites an example of the use of the word enlist in 1698—E. Ludlow Mem. III 99—"That the like number was enlisted under my command in the western part of England."

In 1707, the Mutiny Acts were extended by 6 Anne, c. 18 (c. 20 in some editions), to apply to "every person being in his Majesty's service in the army, or mustered, or in pay as an officer, *or* listed *or* in pay as a soldier." And this form was substantially followed in the annual Mutiny Acts during the Eighteenth Century, the listing *or* receipt of pay in the alternative being held to constitute a man a soldier.

As was said in *Grant* v. *Gould* (1792) 2 H. Blackstone 69, p. 103, in construing the similar Mutiny Act of 31 George III:

"The act does not leave it to a question, whether his inlistment and attestation is regular or not, but it says, 'any person who shall be inlisted or *receive pay as a soldier.*' The being in pay as a soldier, fixes the military character upon him, and very wisely; and my brother *Bond* has shewn that this has been the course of all the acts of parliament, which have passed relative to the military engagement. The Mutiny Act squares itself with the number of statutes which had passed relative to the military services, and the persons who are engaged to serve. It was not left to be discussed, where there was a remedy by indictment, what was the nature of the engagement, or how it was contracted, but the mere circumstance of being in pay or having received prest-money, fixed on him the military character, so as to subject him to the consequences of a felony if he acted in breach of that character."

And as stated in *Tyler* v. *Pomeroy* (cited *supra*):

"The law of England has since by similar provisions required either enlistment by a military officer, with full opportunity to reconsider and retract, in the case of a soldier, or actually being mustered or commissioned in the case of an officer, to subject either to military discipline; allowing, however, the alternative of *being in pay* to avoid the necessity of discussing the nature of the engagement or mode of contracting it." (p. 490–491.)

The first general recruiting act was passed in 1703 (2 and 3 Anne, c. 13, or c. 19 in common printed editions)—"An Act for raising recruits for the Land Forces and Marines," etc. It provided for a levy of able-bodied men, delivery of them to officers appointed to receive them, payment of 20 shillings to each man, "and from and after payment of the said twenty shillings, or tender or refusal thereof, and reading the said articles of war, every person so raised shall be deemed a listed soldier."

This appears to be the first statutory declaration of what constituted enlistment; and section 3 thereof provided for volunteers as follows: "and for the encouragement of fit and able persons *voluntarily to enter themselves* in Her Majesties service, it is hereby further

enacted and declared that the officer who is to raise such recruits shall out of the levy money forthwith pay to every person who shall so *voluntarily enter himself* in Her Majesties service the sum of forty shillings."

This statute is the first in which the phrase "enter himself" appears. It is to be noted, however, that in section 6 the word "listed" is used, apparently as applicable to both levies and volunteers.

In 1756, a similar but more elaborate act was passed (29 George II, c. 4), "An Act for the speedy and effectual recruiting of His Majesty's land forces and marines," which provided for a compulsory levy of able-bodied men to be "listed," "inlisted," etc., and their delivery over to officers "appointed to receive recruits;" and for the first time the term "impressed men" was used with reference to such "new raised men." In section 14, it was provided that from and after such delivery, and reading the articles of war, "every person so raised shall be deemed a listed soldier;" and his pay was to begin from the time of being taken and secured.

There was no provision for volunteers in this statute.

In the same year (1756), however, another statute (29 George II, c. 35) enacted that it should be lawful for any officer serving in America "to inlist as a soldier or soldiers" any indented servant in the American colonies "who shall be willing to *enter and inlist* in any of the said forces"; and section 3 of this act referred in terms to a person who "*shall list and enter himself* as a volunteer"; and section 11 provided that any person receiving "the inlisting money" and thereafter absconding should be deemed "inlisted" to all intents and purposes as if he had taken the oath.

The Mutiny Act of 1760 (1 George III, c. 6) provided for punishment for desertion of "any person being mustered, or in pay as an officer, or who is or shall be listed or in pay as a soldier * * * or shall * * * *voluntarily enter himself* in His Majesty's service as a soldier."

In 1757, an Act was passed (30 George II, c. 8) similar to that of 1703 for levy of recruits, and also for volunteers; and provision was made for the manner in which a volunteer should "enter himself into His Majesty's service," for entry of his name in books by the commissioner, and copies to be transmitted to the war office for comparison with the muster rolls after delivery of the volunteers to the officer appointed to receive them, and it was provided (section 6) "that the pay of every such volunteer shall commence from the time that he shall so *enter himself* into His Majesty's service."

The word "inlisted" is used in this act as applicable apparently both to impressed men and to volunteers, for section 15 provides:

"that no person shall be inlisted by the said commissioners by virtue of this act who is not an able bodied man as is fit to serve his Majesty, and is free from ruptures and every other distemper, or bodily weakness or infirmity, which may render him unfit to perform the duty of a soldier; and that no man be inlisted for his Majesty's service by virtue of this act, who shall appear in the opinion of the Commissioners or officer or officers appointed to receive the impressed men to be under the age of seventeen years or above the age of forty five years, or a known papist, or who shall be under the size of five feet four inches without shoes."

And sections 29 and 30 provided that:

"No private soldier who shall be duly listed into his Majesty's service by virtue of this Act * * * shall be discharged," etc.

"Provided always * * * that every person who shall be impressed upon this Act, after he shall have continued in the military service of his Majesty * * * during the space of five years * * * shall be at liberty if he thinks fit to demand his discharge."

In 1778, another "Act for the more easy and better recruiting of his Majesty's land forces and marines" (18 George III, c. 53) made similar provision for levies and for any person who may "voluntarily enter himself into his Majesty's service."

In 1779, another similar Act was passed (19 George III, c. 10) for levies and volunteers, in sections 39 and 41 of which, referring to volunteers, the phrase "enter into his Majesty's service" is used instead of the phrase "enter himself into his Majesty's service." In section 40 the latter phrase, however, recurs. In sections 44 and 45 a distinction was apparently taken between an "inlisted" soldier and an "impressed" soldier, for the former provided—

"that no private soldier who shall be duly inlisted *or* impressed into his Majesty's service by virtue of this Act shall * * * be discharged," etc.

In 1780, the Act of 20 George III, c. 37, refers to the "encouragement of volunteers to inlist in his Majesty's service."

DEFINITION OF THE TERMS "ENLIST OR ENTER HIMSELF."

(1) *English use of the word "Enlist."*

In 1713, when the word "inlist" was used in the English statute, from which the American Act of 1794 was drawn, it had acquired (as an intransitive verb) two substantially definite meanings, in popular use, one restricted, the other more extensive, as shown in dictionaries published during the middle of the Eighteenth Century.

(*a*) This definition lays stress upon the act of enrolling, registering, or listing.

Defoe's English Dictionary (1735):

Inlist: To enter into the list of soldiers;

Samuel Johnson's English Dictionary (1755):

List: v. a. (from List, a roll);

1. To enlist; to enroll or register;
2. To retain and enrol soldiers;

> The lords would, by *listing* their own servants, pursuade the gentlemen in the town to do the like. *Clarendon*, b. VIII.
>
> The king who raised this wall appointed a million of soldiers, who were *listed* and paid for the defence of it against the Tartars. *Temple.*
>
> Two hundred horse he shall command; Though few, a warlike and well-chosen band, These in my name are *listed. Dryden.*

Bailey's English Dictionary (1755):

To List, to enter soldiers; also to enter his name as a soldier;

To List—verb act. (from *list*, a roll). 1. to enlist, to enrol, or register. 2. To retain and enrol soldiers. * * *

Buchanan's New Dictionary (1769):

Inlist: To enter into the list of soldiers.

(*b*) The broader definition regards enlisting as the act of entering into military service by whatever manner or method the act is performed.

Dyche's English Dictionary (London, 17th ed., 1794):

Inlist: To enter or engage in the military service of a prince or state;

Entick's New Spelling Dictionary (London, 1782):

Inlist: To engage or enter into military service.

Perry's Dictionary (London, 1795):

Inlist: To engage in the military service.

Scott's Dictionary (Edinburgh, 1797):

Inlist: To engage or enter into the military service.

The word had also acquired a technical meaning in the various English recruiting and mutiny statutes, under which an enlisted man was one who had complied with the provisions of those statutes. "To enlist" meant the performance of those acts necessary to constitute a man a soldier within the meaning of the statutes relating to military service.

The act of enlisting appears to have been always contractual. Under the earliest statutes, the soldier was enlisted, or (as then termed) "retained," by express contract or indenture with his cap-

tain or with the King; he was also deemed enlisted if in actual service or in receipt of "prest" or part payment of wages.

Under the later recruiting and mutiny statutes of the Seventeenth and Eighteenth Centuries, the soldier was deemed to be enlisted and to have the status of soldier:

(*a*) by actual listing by the proper officials of either impressed men or volunteers, which listing must be with express free consent;

or

(*b*) by being in pay, i. e., acceptance of pay, from which consent was to be implied.

The word "inlist" in the Foreign Enlistment Act of 1713, however, could not bear this technical meaning, for it referred to the act of enlisting in foreign service by a British subject at the instance of some private person, and acting under no provision of British statutory recruiting law.

Undoubtedly, however, the word "inlist" in connection with service in a foreign army, was intended to comprise the performance of acts of a similar character to those acts which constituted enlistment in the service of Great Britain.

It is submitted, therefore, that in this English Act of 1713 (as well as in the American Act of 1794) the word "inlist" or "enlist" is to be given the general meaning of: To engage in the military service through the performance of acts or the making of agreements of a character similar to those acts or agreements which would constitute an enlisting under the British statute; in other words, to enter into a contractual relation for military service either by express agreement or receipt of pay. By the express terms of the English Act of 1756 (*supra*, p. 9, 11), receipt of the enlisting money was not necessary to constitute an enlistment for military service of a foreign state.

(2) *American use of the word "Enlist."*

The term "enlist" and "enlistment" is used in the early Army acts of the United States in a clearly definite and technical meaning of enrollment followed by oath of allegiance. See Act of April 30, 1790, c. 10 (1 Stat. 119), sections 1, 2, 12; Army Act of March 3, 1791 (1 Stat. 222), sections 4, 8; Army Act of March 5, 1792, c. 9 (1 Stat. 241), section 6, providing "that the commissioned officers, who shall be employed to recruit for the establishment, shall be entitled to receive for every recruit *duly enlisted and mustered*, two dollars."

The American courts have consistently held that enlistment is a contractual relation.

In re Morrissey (1890), 137 U. S. 157, 159:

"An enlistment is not a contract only, but effects a change of status."

In re Grimley (1890), 137 U. S. 147, 150:

"This case involves a matter of contractual relation between the parties; and the law of contracts, as applicable thereto, is worthy of notice. The Government, as contracting party, offers contract and service. Grimley accepts such contract declaring that he possesses all the qualifications prescribed in the Government's offer. * * *

Enlistment is a contract; but it is one of those contracts which changes the status; and where that is changed no breach of the contract destroys the new status or relieves from the obligations which its existence imposes."

And it was held in this case (p. 156) that the taking of the oath is the final act in the matter of enlistment in the United States Army.

See also *Babbitt* v. *United States* (1880), 16 Ct. Cls. 202, 213, 214:

"'Enlistment' is a technical word, derived from Great Britain, with a technical meaning. In the English Cyclopedia it is defined to be 'a voluntary engagement to serve as a private soldier for a certain number of years.' Chambers defines it as 'the mode by which the English Army is supplied with troops as distinguished from the *Conscription* prevailing in many other countries.' Littré, the best French authority, defines Conscription as an 'appel au service militaire, par voi du tirage au sort,' and he defines an *enrolé*, which is the equivalent of an 'enlisted man,' as an 'enrolé volontaire.' True to this distinction between a voluntary engagement as distinguished from a conscription or draft the statutes of the United States allow only persons who are capable to contract to enter the Army by enlistment (Rev. Stat., §§ 1116, 1117, 1118), and require the contract to be made for a term of years. (Section 1119.) True also to the other idea that this form of engagement is confined to persons who are ordinarily known as common soldiers, the statutes employ the term 'enlist' only with reference to contracts with persons who enter the army as privates, and to certain other classes of men, like Indian scouts and hospital stewards, who rank like soldiers, and voluntarily put themselves under military law. (Rev. Stat., §§ 1099, 1100, 1101, 1102, 1103, 1104, 1107, 1108, 1111, 1112, 1115, 1155, 1162, 1180.)"

See also *Hilliard* v. *Stewartstown* (1869), 48 N. H. 280, 281:

"I do not find that in military usage the term *enlist* or enlistment is ever used to signify the engagement of a commissioned officer in the military service."

See also *Erichson* v. *Beach* (1873), 40 Conn. 283, 286:

"We think he duly enlisted when he signed the petition to the Governor and was accepted as a member of the active militia. An enlistment, says Bouvier, is 'the act of making a contract to serve the government in a subordinate capacity, either in the army or navy.' To enlist, says Webster, is 'to enroll for military service.' It is obvious from these definitions that the defendant did all that he possibly could have done had he signed a formal enlistment paper. He offered himself to the Government in unmistakable written terms, and, before the proposition was withdrawn, was accepted, and he and his associates were organized into a military company.

"After this was done we think the contract of enlistment was complete, and that the defendant could not afterwards withdraw from the service."

See also *Franklin* v. *Commonwealth* (1849), 10 Pa. State, 357, 360:

"But the relator did not enlist even as a volunteer. The word is to be taken in the popular sense of it; and in England, whence we brought it, as well as in the American states, it means not merely to enroll the name, but to sign a written contract of military service made on the part of the government by a recruiting officer."

See also *Sheffield* v. *Otis* (1871), 107 Mass. 282, 284:

In this case the Massachusetts statute (act of 1868, c. 328, sec. 3) referred to "any person who shall have been duly enlisted and mustered into the military or naval service of the United States * * * under any call of the President of the United States during the recent Civil War * * *."

"It seems clear to us that the case is not taken out of the statute by the fact that Walley was drafted, and did not volunteer to enter the service. The words of the statute are, 'any person who shall have been duly enlisted,' and not any person who shall voluntarily enlist. By the primary meaning of the word, a person is 'enlisted' whose name is duly entered upon the military rolls, and it applies to those who are drafted as well as to those who volunteer. Both are enlisted. The word is used in this sense in the articles of war for the government of the armies of the United States. The eleventh article provides that, 'after a noncommissioned officer or soldier shall have been duly enlisted and sworn, he shall not be dismissed the service without a discharge in writing.' The twentieth article provides that 'all officers and soldiers who have received pay, or have been duly enlisted in the service of the United States, and shall be convicted of having deserted the same, shall suffer death or such other punishment as by sentence of court martial shall be inflicted.' U. S. St. 1806, c. 20; U. S. Sts. at Large, 361, 362. In both of these articles the term 'duly enlisted' necessarily includes soldiers who have been drafted, as well as those who have entered the service as volunteers."

Bouvier's Law Dictionary defines enlistment as follows:

"The act of making a contract to serve the Government in a subordinate capacity, either in the army or navy. The contract so made is also called an enlistment. A drafted man is said to be "enlisted", as well as a volunteer, but the term does not apply to one entering the army under a commission. The contract of enlistment involves a change in the status of the recruit, which he cannot throw off at will, though he may violate his contract."

From the above citations, it is clear that the word "enlist" signifies such action as shall constitute a completed contract, affecting the legal status of soldier in the service of his government.

(3) *Definition of the term "Enter himself."*

Such being the definition of "enlist," it becomes necessary to consider whether, in 1713, the words "enter himself" had a technical meaning different from "enlist."

Careful examination of the statutes prior to 1713 does not disclose the use of "enter himself" in connection with military service prior to the Act of 1703. In that Act, they were used as describing the action of volunteers in becoming soldiers. In the same connection they were used in the Acts of 1756, 1757, 1760, 1778, 1779. (*See supra.*)

It appears, however, that the word "enlist" also was applied both in statutory and popular use to volunteers as well as to impressed men. It further appears that in at least one statute passed within a few years after the Act of 1713 the word "list" was used synonymously with "enter himself"—"list and enter himself" (see Act of 29 George II, c. 35, p. 16, *supra*) as applied to volunteers; so, too, in the Act of 29 George II, c. 17.

It is possible, therefore, that the two terms had no separate or distinct meaning and that they were both used in the Act of 1713 out of abundance of caution.

But since under fundamental rules of statutory construction some meaning must be given if possible to every word of a statute, it is submitted that "enter himself" may reasonably be construed to apply to all actions comprising or looking toward entry into actual military service but falling short of complete technical statutory enlistment, or failing in such class of requirements as were necessary to constitute a person a soldier within the meaning of the recruiting or mutiny statutes or articles of war (whatever they might be) of the nation for whose service the man was hired.

It has been argued that the term "enter himself" in the Act of 1713 might be intended to apply to the action of an officer as contrasted with "enlist," which term always applied to a private soldier and

never to an officer. It is to be noted, however, that only a few years later, in 1756 (29 George II, c. 17), an act was passed making it a felony for any British subject to "take or accept of any military commission, *or otherwise enter into the military service* of the French King, as a commissioned or noncommissioned officer," without license; from which it would appear that the earlier statute was not deemed to be sufficient to cover the case of an officer.

Section one of the American Act of June 5, 1794 (1 Stat., 381), now section 9 of the Federal Penal Code, was undoubtedly copied from this English statute. Section 10 of the Penal Code, however, absolutely precludes the application of the word "enter himself" to officers, for it specifically limits the words to "service as a soldier or as a marine or seaman."

(4) *Definition of the term "Hire or retain."*

It is submitted that the presence of the word "retain" in the English Act of 1713 was undoubtedly a mere survival of the ancient word employed in the early English statutes of Henry VI, Henry VII, and Henry VIII, although the system of engagement for military service embodied in them had fallen into disuse long before 1713. The word "retain," therefore, is strictly to be given the meaning which it had in the ancient statutes, i. e., as signifying an indenture or agreement to serve made between the captain and his retinue of soldiers, or the King and the soldiers directly.

See also Tomlin's edition of *Jacobs Law Dictionary*, citing the statute of 8 Edw. IV, c. 2, which imposed a penalty on "every one so retained either by writing, oath, or promise."

"To retain" was also used in former times in the sense of "To engage a person in service." *Murray's New English Dictionary* (1910) cites five instances from 1450 to 1698 of the use of the word "retain" as "To keep attached to one's person or engaged in one's service."

By the year 1713, however, "retain" had, in popular use, undoubtedly acquired simply the meaning of "hire," and is found in all the dictionaries of the Eighteenth Century as synonymous with "hire."

Retain: To keep in pay, to hire.
Johnson's English Dictionary (1755),
Bailey's English Dictionary (1755);
Kenrich's English Dictionary (1773);
Ash's English Dictionary (1775);
Sheridan's English Dictionary (1790);
Retain: * * * to hire.
Gordon & Marchant (1760):

If, however, "retain," as used in the English Act of 1713 and in the American act of 1794, is to be deemed to be synonymous with "hire," it is clear that the word "hire" is not confined to the act of hiring for pecuniary consideration. It undoubtedly includes any form of engaging the service for any consideration, pecuniary or otherwise. It is to be noted that the English Act of 1756 (29 George II, c. 17, section 4, cited *supra*, p. 9) amplified the wording of former foreign enlistment statutes by making it penal "if any person * * * shall hire, retain, engage, or procure any subject * * * though no inlisting money hath been or shall be actually paid to or received by him"; and as this Act was professedly a declaratory statute, it is to be given weight in construing the meaning of the terms used in the prior statutes.

The decisions of the American courts (though making no reference to the early English statutes) have arrived at conclusions in harmony with the above definition.

See *United States* v. *Hertz* (1855), 26 Fed. Cas., No. 15357:

"The hiring or retaining does not necessarily include the payment of money on the part of him who hires or retains another. He may hire or retain a person with an agreement that he shall pay wages when the services shall have been performed * * * A person may be hired or retained to go beyond the limits of the United States, with a certain intent, though he is only to receive his pay after he has gone beyond the limits of the United States with that intent. Moreover, it is not necessary that the consideration of the hiring shall be money. To give to a person a railroad ticket, that cost $4, and board and lodge him for a week is as good, as a consideration for the contract of hiring, as to pay him the money with which he could buy the railroad ticket and pay for his board himself. If there be an agreement on the one side to do the particular thing, to go beyond the limits of the United States with the intent to enlist, and on the other side an engagement, that when the act shall have been done, a consideration shall be paid to the party performing the services of doing the work, the hiring and retaining are complete." (P. 294.)

United States v. *Kazinski* (1855), 2 Sprague 7; 26 Federal Cases, No. 15508:

"It is to be further observed, that the word 'retain' follows the word 'hire.' We should not expect to find it used in a meaning opposite to that of 'hire,' and opposite to its own usual signification. Suppose it to be used in the sense of detain, and apply it to the enlisting of men here. It at once becomes impossible. It must be used in a sense that will apply to both. The nearest term is probably 'engage,' and it is used like the word 'retaining,' when speaking of

retaining counsel. It is an engaging of one party by the other, with the consent and understanding of both." (P. 685.)

The subject was thoroughly considered by Attorney General Cushing in 1855, who held as follows (7 Op. Atty. Gen., 377–378):

"I presume that if, in the present case, the British minister imagines that the acts performed under his direction were not contrary to the municipal law, it must be on the ground that the recruits were not completely enlisted in the United States; that is, did not here in all form enter the military service of Great Britain. That assumption is altogether fallacious. The statute is express, that if any person shall hire or *retain* another person *to go beyond the limits* or jurisdiction of the United States, *with intent* to be enlisted or entered into the service of any foreign state, he shall be deemed guilty of the defined misdemeanor.

"It is possible, also, that he may have supposed that a solemn contract of hiring in the United States is necessary to constitute the offence. That would be mere delusion. The words of the statute are 'hire or retain.' It is true, our act of Congress does not expressly say, as the British Act of Parliament does, 'whether any enlistment money, pay, or reward shall have been given and received or not' (Act 59 Geo. III, ch. 69, s. 2); nor was it necessary to insert these words. A party may be retained by verbal promise, or by invitation, for a declared or known purpose. If such a statute could be evaded or set at naught by elaborate contrivances to engage without enlisting, to retain without hiring, to invite without recruiting, to pay recruiting money in fact, but under another name of board, passage money, expenses, or the like, it would be idle to pass acts of Congress for the punishment of this or any other offence."

It is submitted, therefore, that hiring, within the meaning of this statute, means the procuring or engaging of a person to enlist by any form of agreement under which any consideration, whether of money or otherwise, moves from the hiring party to the hired; and includes any payment of board, passage money, expenses, or agreement to pay the same.

APPLICATION OF THE LAW TO THE FACTS.

Questions have arisen whether the American statute applies—

(*a*) To hiring or paying expenses of return to the army of "reservists" of foreign nations having a compulsory military service law;

(*b*) To hiring or paying expenses of subjects of a foreign nation which has no compulsory military service law;

(*c*) To hiring or paying expenses of naturalized American citizens formerly citizens of countries having or not having compulsory military-service laws.

As to (*a*), the applicability of the statute would seem to depend upon the nature of the requirements of the foreign compulsory-service law. In general, it is understood that such laws provide that every subject shall be liable to active military service at a certain age and for a certain number of years; that after such service subjects shall be placed upon a reserve list liable to immediate recall until reaching a certain age, in case of war or other military need. If, by the law of such foreign country, the foreign reservist in the United States would, after his return to his own country, be obliged by its statute law to take any active formal step in the nature of enrolling, or listing, or entering himself, or taking any oath, or doing any other formal act of a character similar to that required for enlistment as construed by American law, then to hire or retain such foreign reservist to leave the United States for service in the army of his country would be in violation of the law of the United States.

In the same way, if the law of such foreign country simply provides that all subjects shall be liable to military service, but without actually enrolling or enlisting their names on the army list until called into service, then it will be a violation of the American law to hire or retain such foreign subjects in the United States who have never previously taken an oath or been enrolled or enlisted or seen active service.

If, however, by the law of his country every reservist after his active service constitutes at all times an existing part of the military service of his country, and if upon his return he is not obliged to take any formal step of the nature above outlined, if he simply resumes his place in the ranks as would a soldier "on leave," his recall for service, whether accompanied by payment or consideration in the nature of hire, can in no sense be deemed a violation of American law. There is no enlisting or entering himself, inasmuch as he is already enlisted so far as he ever can be. There is no hiring or retaining to enlist or enter himself, for it is not possible so to hire or retain a man who is already enlisted and entered.

As an illustration of the class of persons to whom the statute is not applicable, it might be noted that Germany has a compulsory military service law. In compliance with a request from the Department of Justice, the State Department, under date of November 24, 1914, transmitted a note from the German Ambassador, in which the latter states:

"* * * men who go to countries beyond the seas are under the control of the District Command in which a body of troops in which they served lies. The District Command has to instruct the man that in the event of mobilization he must always report to the District Command which he first reaches on his return. A note of this direction is

to be entered in both the passport and the book of particulars. (Army Regulations paragraph 346.)

"To the reservist so instructed reports, upon announcement of the mobilization, to the Territory of the Empire by the shortest route without further notice and reports to the nearest District Command where he produces his military passport.

"From that moment he is under military jurisdiction and is to be considered as incorporated in the Army.

"He has no muster roll or any other paper to sign. His belonging to the Army is established by law in paragraph 4 and following paragraphs of the Military Law of November 22, '88, and is confirmed by the military oath he takes when he first joins the army."

The above conclusions as to the applicability of section 10 of the Federal Penal Code to reservists have no bearing, however, upon the question of violations of section 13, which forbids the formation of military expeditions in the United States. It is entirely possible that reservists might be so gathered together in the United States in such an organized body or group, with or without arms, but under officers, or in uniform or in military formation, as to constitute a military expedition within the meaning of said section 13; in which case, the fact that they were reservists would not render them immune from operation of the law. It is entirely possible also that such reservists might be so organized in the United States as to constitute a "corps of combatants," within the meaning of articles 4 and 5 of the Hague Convention No. V, of 1907, which provide:

"ART. 4. Corps of combatants can not be formed nor recruiting agencies opened in the territory of a neutral power to assist the belligerents * * *

"ART. 5. A neutral Power must not allow any of the acts referred to in Articles 2 to 4 to occur on its territory."

This provision, of course, refers to the duty of one neutral state to another, and has no bearing upon the municipal laws within one state.

As to (*b*), it is submitted that the statute is applicable in all cases. The mere fact that the man hired or retained in the United States is a subject of the country in whose army he is hired to serve, does not exclude him from the operation of the statute which makes the forbidden act unlawful "whoever" commits it; nor will such fact render immune the person so hiring or retaining, for the statute makes it unlawful to hire or retain "another person."

These words clearly include any person whether or not he is already a subject of the country he is hired to serve. If not already enlisted or entered in the army of such country, such a subject is as

susceptible of being hired or retained as is the citizen of any other country, and hence comes within the purview of the statute.

Congress intended that recruiting offices for service in foreign armies should not be opened up in this country, and was not at all concerned with questions of the nationality of the men recruited. Its object was to prevent enlistment for foreign service within the territory of the United States and the consequent infringement of the sovereignty of this Nation; in carrying out this object it intended its prohibition to fall alike on nationals and non-nationals of the country for whose service the recruiting was made here.

Particular emphasis is to be given to the language of the statute in this respect; inasmuch as the English Act of 1713 confined the crime to the hiring or retaining of English subjects, while the American Act of 1794 expressly departed from its English original by extending the provisions specifically to "another person."

As an illustration of the class of persons to whom the statute is clearly applicable it may be noted that Great Britain has no compulsory military service law.

In compliance with a request from the Department of Justice, the State Department, under date of January 4, 1915, transmitted a copy of a memorandum from the British Ambassador relative to the "steps required to be taken by members of the reserve of the British Army and Navy for the purpose of rejoining the colors," together with a copy of the Reserve Forces Act, 1882 (45 and 46 Victoria, ch. 48), being the statute then in force and applicable to the subject. From the above Act, it appears that in the British Army reserve, unless a man has been transferred to the reserve under the Army Act of 1881, he must be "enlisted or reengaged in pursuance of this act" (act of 1882); and in the British militia reserve he must also be specifically enlisted or reengaged. Hence any British subject now in the United States, when called back to serve in the British army, must apparently, so far as the Department of Justice is informed, take some active step to enlist, to reenlist, or to engage or reengage himself in the British military service. His status is entirely dissimilar to that of the "reservists" of countries in which compulsory military service is required by law.

The question, therefore, whether a British subject in the United States has in any particular instance violated the provisions of section 10 of the Penal Code forbidding enlisting or entering himself in this country can only be answered when the special facts in each case shall be set forth.

In the same manner, any individual alleged to have hired or retained within the United States a British subject either to enlist or to enter himself, or to go abroad with the intent to enlist or to

enter into the service of Great Britain, will be liable to indictment and to conviction according to the proof of the facts constituting the elements of the crime in each particular case.

It has been argued that a practical distinction exists between hiring or assisting the return of a subject of a belligerent nation for the purpose of entering that country's military service and hiring or assisting a nonsubject of that nation to leave the United States for such purpose; and that to construe the law as forbidding the first would bear hardly upon those countries having no compulsory military service. It is further argued that, since an absent subject has a patriotic moral duty to assist his nation and to return in time of war, it should be deemed lawful for his nation's representative in the United States to assist in his return.

However valid and appealing such arguments may be, they must be addressed to the legislative rather than to the judicial branch of this Government.

The law makes no discrimination between subjects of various nations. It forbids the hiring or retaining of *anyone* to go out of the United States with intent to enlist in the service of a foreign state. If, by reason of the legislation of his home country, a foreign subject in the United States is carried on the army rolls of the foreign country or otherwise is already a constituent member of its military forces, he (if not an American citizen) will not be subject to the operation of the statute, since his status is such as to make it impossible for him to violate the law or for anyone else to violate the law by hiring or retaining him.

If, on the other hand, his status, by reason of the lack of such legislation, is such as to make it possible for him or anyone else to violate the laws of this country, the law must be enforced in case of such violation.

As to (*c*), it is submitted that the statute is applicable in all cases.

Subjects of foreign nations, upon naturalization in the United States, have but one allegiance, namely, to the United States, and so long as they remain in the United States are under no liability to respond to any call to military service in a foreign country. As stated in *Moore's International Law Digest*, Vol. III, p. 519:

"From the point of view of the doctrine of expatriation as enunciated by the United States, the man who, voluntarily forsaking his original home and allegiance acquires a new one, has thereafter but one allegiance—that of his adopted country."

The United States recognizes no duty resting upon any American citizen while in this country to comply with the laws of a foreign nation relating to military service. Any agreement which he may make in this country to return to his native country for service in

its army is an act looking toward an enlistment, inasmuch as it is made voluntarily, of his own election, and not as a result of his status or of a duty imposed upon him by the law of his native country.

Naturalized American citizens therefore, even if formerly citizens of a foreign country having compulsory military service law, can not lawfully be hired or paid in any way to return to service in the army of their former country.

Respectfully submitted.

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Assistant Attorney General.

JULY 30, 1915.

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